71-1072
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1072

GLENN R. HEYMAN, TRUSTEE IN BANKRUPTCY OF F. W. KOENECKE & SONS, INC.,

Petitioner.

vs.

GEORGE E. MAHIN, SUCCESSOR DIRECTOR OF THE DEPARTMENT OF REVENUE OF THE STATE OF ILLINOIS, ET AL.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

(With Appendix)

EDWARD J. WENDROW,
FRANK O. WETMORE,
Attorneys for Petitioner.

WINSTON & STRAWN,
One First National Plaza,
Chicago, Illinois 60670,
Of Counsel.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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GEORGE E. MAHIN, SUCCESSOR DIRECTOR OF THE DEPARTMENT OF REVENUE OF THE STATE OF ILLINOIS, ET AL.,

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

Petitioner, Glenn R. Heyman, Trustee in Bankruptcy of F. W. Koenecke & Sons, Inc. respectfully prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Illinois affirming judgment of the Circuit Court of Cook County, Illinois in this case which is reported at 49 Ill. 2d 284; 275 N. E. 2d 421, rehearing denied November 24, 1971.

JURISDICTIONAL STATEMENT

Petitioner seeks review of judgment by the Supreme Court of Illinois rendered September 30, 1971, rehearing denied November 24, 1971, affirming on rehearing the judg-

ment of the Circuit Court of Cook County, Illinois dated June 12, 1969. The judgment raises significant questions with respect to the repugnance of an Illinois Statute to the United States Constitution which were raised in the Circuit Court of Cook County and on appeal in the Supreme Court of Illinois. Therefore, this Court has jurisdiction to review under 28 U. S. C. §§ 1257(3), 2101(e).

QUESTIONS PRESENTED

1. Whether a regressive graduated discount system of compensating cigarette distributors for affixing tax stamps under a state tax act, the effect of which is to discriminate against high volume distributors to the extent that the discriminatory aspect alone makes it impossible for a high volume distributor to compete in business against sellers of lesser volume, and which destroyed petitioner's 87-year old business in six months after enforcement of the statute, is constitutional under the Fourteenth Amendment of the United States Constitution.

2. Whether the Supreme Court of Illinois may deny federal constitutional rights by characterizing for the first time on rehearing and on its own motion, factual allegations, as "conclusions" of the pleader.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Involved are the following provisions of the United States Constitution:

Section 1 of the XIV Amendment to the United States Constitution.

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statutes Involved

Definitions of distributor the Cigarette Tax Act Ill. Rev. Stat. 1967, Ch. 120 § 453.1.

" 'Distributor' means any and each of the following:

(1) Any person engaged in the business of selling cigarettes in this State who brings or causes to be brought into this State from without this State any original packages of cigarettes, on which original package there is no authorized evidence underneath a sealed transparent wrapper showing that the tax liability imposed by this Act has been paid or assumed by the out-of-State seller of such cigarettes, for sale or other disposition in the course of such business.

(2) Any person who makes, manufactures or fabricates cigarettes in this State for sale in this State.

(3) Any person who makes, manufactures or fabricates cigarettes outside this State, which cigarettes are placed in

original packages contained in sealed transparent wrappers, for delivery or shipment into this State, and who elects to qualify and is accepted by the Department as a distributor under Section 4b of this Act."

Tax Rate and Discount Provision, Ill. Rev. Stat. 1967, Ch. 120, § 453.2:

"**Tax imposed — Rate — Collection and payment — Discount.]** § 2. (a) A tax is hereby imposed upon any person engaged in business as a retailer of cigarettes in this State at the rate of 4 mills per cigarette sold, or otherwise disposed of in the course of such business in this State. In addition to any other tax imposed by this Act, a tax is hereby imposed upon any person engaged in business as a retailer of cigarettes in this State at the rate of one-half mill per cigarette sold or otherwise disposed of in the course of such business in this State on and after January 1, 1947, and prior to the time that the Service Recognition Bond, Interest and Retirement Fund created by the Sixty-fourth General Assembly contains sufficient money to retire all bonds payable from that fund. The payment of such taxes shall be evidenced by a stamp affixed to each original package of cigarettes, or an authorized substitute for such stamp imprinted on each original package of such cigarettes underneath the sealed transparent outside wrapper of such original package, as hereinafter provided. However, such taxes are not imposed upon any activity in such business in interstate commerce or otherwise, which activity may not under the Constitution and Statutes of the United States be made the subject of taxation by this State.

When any tax imposed herein terminates or has terminated, distributors who have bought stamps while such tax was in effect and who therefore paid such tax, but who can show, to the Department's satisfaction, that they sold the cigarettes to which they affixed such stamps after such

tax had terminated and did not recover the tax or its equivalent from purchasers, shall be allowed by the Department to take credit for such absorbed tax against subsequent tax stamp purchases from the Department by such distributor.

The impact of the tax levied by this Act is hereby declared to be imposed upon the retailer and shall be prepaid or pre-collected by the distributor for the purpose of convenience and facility only, and the amount of the tax shall be added to the price of the cigarettes sold by such distributor. Collection of the tax shall be evidenced by a stamp or stamps affixed to each original package of cigarettes, as hereinafter provided.

It shall be the duty of each distributor to collect the tax from the retailer, at or before the time of the sale, to affix the stamps as hereinafter required, and to remit the tax collected from retailers to the Department, as hereinafter provided. Any distributor who shall fail to properly collect and pay the tax imposed by this Act shall be liable for the tax.

The amount of the Cigarette Tax imposed by this Act shall be separately stated, apart from the price of the goods, by both distributors and retailers, in all advertisements, bills and sales invoices.

Every retailer having cigarettes in his possession for sale on August 1, 1967, shall be required to inventory and pay this additional tax of 1967 in a manner prescribed by the Director of Revenue.

(b) *The distributor shall be required to collect the taxes provided under paragraph (a) hereof, and, to cover the costs of such collection, shall be allowed a discount* during any year commencing July 1st and ending the following June 30th in accordance with the schedule set out hereinbelow, which discount shall be allowed at the time

of purchase of the stamps when purchase is required by this Act, or at the time when the tax is remitted to the Department without the purchase of stamps from the Department when that method of paying the tax is required or authorized by this Act. *A discount equal to 2 2/9% of the amount of the tax up to and including the first $700,000.00 paid hereunder by such distributor to the Department during any such year, 1 7/9% of the next $700,000.00 of tax or any part thereof, paid hereunder by such distributor to the Department during any such year; 1 1/3% of the next $700,000.00 of tax, or any part thereof, paid hereunder by such distributor to the Department during any such year; and 8/9 of 1% of the amount of any additional tax paid hereunder by such distributor to the Department during any such year.*" (Emphasis added.)

Section 2(b) of the 1968 Act is identical in material respects with Section 2(b), as amended in 1967, as above set forth.*

STATEMENT OF CASE

The State of Illinois has imposed a cigarette tax since 1941. Ill. Rev. Stat. 1967 and 1968, Ch. 120, §§ 453.1-453.29. Payment of the tax is evidenced by a tax stamp. Since 1941 the statute has imposed upon wholesale distributors the duty of affixing a tax stamp to each package of cigarettes sold in Illinois, and has allowed the distributor a discount on the purchase of tax stamps as compensation for affixing them to packages (*Id.* § 453.2).

From 1941 to 1963 the discount to wholesalers remained five percent regardless of the volume of a distributor's

* In 1967 Section 2(b) was amended by two Acts of the legislature, one of which continued the discounts established by the 1965 amendment and the other which established the discount rates set forth above. (See Ill. Rev. Stats. 1967, Ch. 120, § 453.2, 1967.) The 1968 Act continued the rates set by the 1967 amendment quoted above. The amended complaint alleges the discounts allowed in 1968 were those specified in the 1967 amendatory Act.

annual tax stamp purchases. (Ill. Rev. Stat. 1941, Ch. 120, § 453.2(b).) Effective in 1963 the statute was amended to provide four regressive graduated discount brackets, granting decreasing discounts for each $700,000 increment of tax stamps purchased in a year. (Ill. Rev. Stat., 1963, Ch. 120, § 453.2(b).)

Since 1941 the cigarette tax per package has increased from time to time. Since 1963 the rate of discount allowed to wholesalers has decreased from time to time, but the graduated discount brackets have remained at $700,000 increments and the discount rate differentials between brackets have remained proportionate.* (Ill. Rev. Stats. 1963, , 1968, Ch. 120 § 453.2(b).)

It is the graduated discount feature which the petitioner has attached here as violative of the equal protection and other provisions of the Fourteenth Amendment of the United States Constitution.

From the time of its enactment in 1963 to the summer of 1968 the graduated feature of the discount system was not enforced. Under an interpretation of an opinion by the Illinois Attorney General, the Illinois Department of Revenue permitted a practice of employing multiple licensees to purchase tax stamps. Under this practice, when one licensee had purchased $700,000 face value of stamps and was therefore faced with graduating to a lower discount bracket, the business was continued, but in the name of a different corporate or individual licensee. The effect was that from 1963 to 1968 all distributors operated in the same (the highest) discount bracket.

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*Discount brackets in 1968 and 1969 (Ill. Rev. Stat., 1967 and 1968, Ch. 120, § 453.2(b)):

Stamp Purchases	Discount
$ 0 — $ 700,000	2 2/9%
$ 700,000 — $1,400,000	1 7/9%
$1,400,000 — $2,100,000	1 1/3%
Over $2,100,000	8/9 of 1%

In the summer of 1968 the Illinois Department of Revenue discontinued its practice of allowing multiple licensees.

F. W. Koenecke & Sons, Inc. ("Koenecke") was the successor to a family business which had been in the cigarette distribution business for over eighty years. In 1968 it was by far the largest single distributor of cigarettes in the midwest. It purchased over $40,000,000 of Illinois cigarette tax stamps annually which, at 9¢ per package, provided stamps for more than 440,000,000 packages of cigarettes.

When the discount provisions of the statute were enforced in accordance with their terms in the summer of 1968, Koenecke, because of its large volume of purchases, was within one month plunged into the lowest discount bracket. Compared with a group of smaller cigarette distributors doing an equivalent volume, but each operating in the highest discount bracket, Koenecke was placed at a competitive disadvantage of in excess of $650,000 per year.

Koenecke filed this suit in the Circuit Court of Cook County, Illinois, on August 29, 1968. The original complaint was dismissed upon the motion of the defendants and an amended complaint was filed on November 26, 1968, alleging the facts summarized above, and specifically alleging that the costs of collecting the cigarette tax do not decrease with increased collections of said tax (Amended Complaint, ¶ 14, Appendix at A7). The amended complaint correctly predicted the destruction of Koenecke's business as a result of enforcement of the graduated discount provisions.

The petitioner also specifically alleged in the amended complaint, at Paragraph 20, that the regressive graduated discount system was invalid and unconstitutional as being in violation or contravention of the United States Constitution for the reason that it deprived it of its property without due process of law in violation of the Fourteenth

Amendment and deprived the petitioner of equal protection of the law guaranteed by the Fourteenth Amendment. These federal questions were pressed in the proceedings in the Circuit Court of Cook County, Illinois (Appendix at A20), and ultimately before the Supreme Court of the State of Illinois (Appendix at A26, A45).

Following filing of the amended complaint, an order was entered directing defendants to segregate and hold aside from the general fund of the State of Illinois the difference (paid under protest by Koenecke) between the amount paid by Koenecke for stamps at the lowest discount rate and the amount which would have been charged in the highest discount bracket. However, Koenecke was required to continue to purchase the stamps at the lowest discount rate.

A motion to dismiss the amended complaint was filed on behalf of the defendants, but before it was heard in the Circuit Court, Koenecke was adjudicated a bankrupt upon an involuntary petition filed against it on March 13, 1969.

The cigarette industry is extremely competitive and the margins of profit to distributors small. Thus, an 87-year old business which was the largest in its industry in the middle west was destroyed in a scant six months after the discriminatory regressive discount system was first enforced as written.

The petitioner succeeded to Koenecke's position as its trustee in bankruptcy. The motion to strike the amended complaint for failure to state a cause of action was heard and granted by the Circuit Court of Cook County (Appendix at A15, A20, A21). Petitioner appealed directly to the Supreme Court of Illinois on the state and federal constitutional issues.

On December 4, 1970, the Supreme Court of Illinois reversed the judgment of the Circuit Court of Cook County and ordered the case remanded. In that opinion (Appendix at A22-A29), Mr. Justice Crebs of the Illinois Supreme

Court held that the graduated discount provision was in effect a tax upon the distributor and noted that the Illinois and federal Constitutions only protect a taxpayer from invidious discrimination and that a tax which bears more heavily on one taxpayer than another does not of itself violate the uniformity provision of the Illinois Constitution or the equal protection clause of the federal constitution. But the Court held that if the allegations of the amended complaint were true, the regressive discount system would violate petitioner's constitutional rights as expressed by this Court in *Stewart Dry Goods Co.* v. *Lewis*, 294 U.S. 550, 556, 79 L. Ed. 1054, in that it "exacts from two persons different amounts for the privilege of doing exactly similar acts because the one has performed the act more oftener than the other." (Appendix at A26-A27). The Illinois Court acknowledged that the legislature has broad powers to enact tax laws which affect some persons differently than others so long as there is a reasonable state of facts to justify the discrimination. The Court ruled, however, that the facts alleged in the amended complaint conflict with the legislative determination to such an extent that the graduated discount would be invalid, and that the petitioner is entitled to an opportunity to prove those allegations.*

The defendants filed a petition for rehearing (Appendix at A30-A35) which was granted, and on September 30, 1971, Mr. Justice Ryan rendered an opinion of the Supreme Court in which the judgment of the Circuit Court of Cook County was affirmed. There are no facts intervening between the two diametrically opposite opinions except changes in the personnel of the Illinois Supreme Court.

* To emphasize the inconsistency of the legislative graduations, Justice Crebs points out that each time the cigarette tax is increased, the large producer is more rapidly put at a competitive disadvantage, since the graduations are based upon the dollar volume of stamps purchased and not upon the number of stamps affixed (Appendix at A27).

Mr. Justice Ryan's opinion, which reversed the Court's prior holding and found that the Illinois cigarette tax was not a tax upon the wholesaler, is based upon two grounds:

(1) The graduated discount provisions of the Cigarette Tax Act do not violate Section 1 of Article IX of the Illinois Constitution of 1870 (Revenue) because a 1963 amendment to the Act declared that the impact of the tax was on the retailer; hence, petitioner has not been a "taxpayer" since that time; and

(2) Viewing the graduated discounts as compensation statutes, they are not invalid because petitioner has supposedly alleged only that "Said costs do not decrease with increased collections of said tax." This allegation is first criticized as possibly referring only to petitioner's costs and in failing to tell the Court whether petitioner ran its business with reasonable efficiency, when compared with others in its calling. Alternatively, the Court holds that, if it be assumed that the allegation is that the costs generally, instead of petitioner's costs, do not decrease with increased collection of taxes, this is only a *conclusion* of the pleader, which is not admitted by the motion to dismiss the amended complaint (Appendix at A44, A45).

The Court finds that "the admitted allegations do not indicate that the classifications are arbitrary or capricious in violation of the equal protection clause of the fourteenth amendment of the Federal constitution" (Appendix at A45).

Each of the above grounds is further discussed below.

The petitioner filed a petition for rehearing after the September 30 opinion, which petition was denied on November 24, 1971. Petitioner now files its petition for writ of certiorari.

ARGUMENT

A writ of certiorari should be granted because the Illinois Supreme Court has decided an important federal question of substance not heretofore determined by this Court and has also decided it in a way probably not in accord with applicable decisions of this Court. In brief, certiorari should be granted for both reasons stated in Rule 19(1)(a) of this Court.

In its original opinion herein, the Supreme Court of Illinois held that if petitioner proved the allegations of its amended complaint, the regressive graduated discount provision of the Illinois cigarette tax statute would be invalid under this Court's decision in *Stewart Dry Goods Co.* v. *Lewis*, 294 U. S. 550, 556, 79 L. Ed. 1054.

On rehearing, the Illinois Court held on its own motion that the cigarette tax was not on petitioner but upon the retailer, and that petitioner, as a mere collector of the tax, was not entitled to relief under the uniformity clause of the Illinois Constitution relating to revenue. (Art. IX, Sec. 1, 1870 Constitution of Illinois.)

Having thus disposed of the state constitutional law point, the Court held that what was involved was a system of compensation and that the allegations in the amended complaint were not sufficient to demonstrate invalidity of the compensation provision under the equal protection clause of the federal Constitution because the claim of discrimination was predicated upon an allegation that costs do not decrease with increased collection of the tax as provided in the statute. The Illinois Supreme Court, contrary to its first opinion, held that this allegation was a "conclusion" which was not admitted by the motion to dismiss, upon the granting of which the case came originally to it.

The Illinois Supreme Court by reinterpreting the Cigarette Tax Act between the first and the second opinions as not laying a tax upon distributors, but upon retailers, and by converting an allegation of fact into a "conclusion", succeeded, in its view, in sustaining the Act against federal constitutional challenge.

We submit that certiorari should be granted primarily for three reasons:

(1) The constitutionality of a state statute under the federal Constitution is not governed by whether it is called a "tax" or a system of compensation. The economic impact upon the person bearing the burden of the discriminatory provision is controlling, not the label attached to it.

(2) Federal constitutional rights may not be defeated by characterizing an admitted allegation as a "conclusion", it having been treated as a fact by the parties and by the Illinois Court through its first opinion. By its interposition of this point in its final opinion on rehearing, the Illinois Supreme Court denied petitioner the opportunity it would have had under the state practice act, to amend any pleading found deficient. State procedure cannot be a barrier to thwart a person enforcing its constitutional rights, especially when interposed for the first time in and by the state court of last resort.

(3) The equal protection clause has received increasing attention by this Court in other fields and it and the other federal courts have readily struck down state legislation far less invidious in its discriminatory effect than the Illinois act under consideration.

The unique legal and factual situation which presents itself in this case centers around the "discounts" given to licensed distributors under the Illinois Cigarette Tax Act (Ill. Rev. Stat. 1967, Ch. 120, § 453.2(b)). Distributors are required by law to collect the tax and affix the tax stamps to all packages of cigarettes sold in Illinois (*Id.*). A distrib-

utor is required by law to make monthly payments toward the collection of tax and is liable if the tax is not paid. However, "[t]he impact of the tax levied by this Act is hereby declared to be imposed upon the retailer and shall be prepaid or pre-collected by the distributor for the purpose of convenience and facility only. . . ."* (*Id.*) This is ostensibly accomplished by having the distributor add the per-package tax to his price and pass it on to the cigarette retailer who passes it on to the consumer.

The effect is that a distributor doing a high volume of business such as petitioner, because it is in the lowest discount bracket, ultimately bears the economic burden of a higher per package tax than smaller volume operators in the highest discount bracket.** The difference in petitioner's case in 1968 and 1969 was in excess of $650,000 per year. As an economic fact, petitioner could not pass this on to its customers who could as readily purchase cigarettes from any number of distributors operating in high discount brackets.

In its first opinion the Illinois Court accepted that the discounts should be treated as tax. On rehearing the Court found as a matter of law that the discount was not a tax but "in the nature of compensation to the distributor to cover the cost of collecting the tax from the retailer."

The Court went on in its second opinion to hold that "the legislature is not required to grant any compensation for collecting the taxes." With this there is no disagreement.

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* Mr. Justice Crebs in the first opinion of the Illinois Supreme Court noted that, "This amendment changing the incidence of the tax was apparently passed to give the consumer a deduction on his Federal income tax return" (Appendix at A24).

** Cigarette taxes paid by petitioner represented approximately 1/3 of the state's revenue from cigarette taxes in 1968 (Appendix A9). No other taxpayer operated in the two lowest discount brackets.

However, when the legislature does decide to create a system of discounts, be it called a tax or compensation, it cannot constitutionally under the due process and equal protection clause of the Fourteenth Amendment to the United States Constitution create a system so discriminatory and invidious as to force petitioner into bankruptcy while permitting its many low volume competitors to prosper.

Irrespective of what the discount system is called, it is the substance with which the Court is concerned and not the form. *American Oil Co. v. Neill*, 380 U. S. 451, 455 (1965); *Quaker City Cab Co. v. Pennsylvania*, 277 U. S. 389, 401 (1928); *Lawrence v. State Tax Commission of Mississippi*, 286 U. S. 276, 280 (1932); *Air-Way Electric Appliance Corp. v. Day*, 266 U. S. 71, 82 (1924); *Wisconsin v. J. C. Penney Co.*, 311 U. S. 435, 443 (1940). As said in the *Penney* case:

> "But the descriptive pigeon-hole into which a state court puts a tax is of no moment in determining the constitutional significance of the exaction. 'In whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect.' *Henderson v. Mayor of New York*, 92 U. S. 259, 268. Such has been the repeated import of the cases which only recently were well summarized by the guiding formulation for adjudicating a tax measure, that 'in passing on its constitutionality we are concerned only with its practical operation, not its definition or the precise form of descriptive words which may be applied to it.' *Lawrence v. State Tax Commission*, 286 U. S. 276, 280."

There is no law under the Fourteenth Amendment which directly deals with discounts of the kind under consideration. Nevertheless this Court has provided a standard in *Danbridge v. Williams*, 397 U. S. 471, 485 (1970) where the court indicated that the standard for finding economic discrimination and social welfare discrimination is the

same. Therefore, it is submitted that the arbitrary discrimination of the case at hand is analogous to that in the cases of *Graham v. Richardson*, 403 U. S. 365 (1971); *Shapiro v. Thompson*, 394 U. S. 618 (1969), *Takahashi v. Fish & Game Commission*, 334 U. S. 410 (1948), where this Court found the respective statutes unconstitutional in violation of the Fourteenth Amendment.

If the regressive graduated discount system is a tax or analogous thereto, this Court has held that a tax with arbitrary and discriminatory classes based on volume are unconstitutional as violative of the Fourteenth Amendment. *Stewart Dry Goods Co. v. Lewis*, 294 U. S. 550 (1935); *Valentine v. Great Atlantic & Pacific Tea Co.*, 299 U. S. 32 (1936).

It is patently unjust for petitioner to have its amended complaint dismissed on a pleading question, raised for the first time by the Illinois Supreme Court *sua sponte* on rehearing before it, and contrary to its own state procedural law*, and thereby deprive petitioner of its federal constitutional rights.

It is further submitted that the Illinois Supreme Court had no right on the record before it to disregard petitioner's allegation forming the basis of the discrimination charge, namely that "costs do not decrease with increased collections" and then in effect make a factual determination to the contrary. This determination is a most flagrant denial of petitioner's federal constitutional rights in view of the present undeniable fact, prophesied in the amended complaint, that the original corporate plaintiff is now in bankruptcy.

*Under Illinois law the Supreme Court is limited, in reviewing a decision on a pleading motion, to the objections raised below. In this case the Court for unexplained reasons raised its own objection. This point was argued upon petitioner's Petition for Rehearing denied by the Illinois Supreme Court on Nov. 24, 1971.

Whether petitioner sufficiently pleaded a federal claim is a question for this Court.

> "It is settled that '[w]hether a pleading sets up a sufficient right of action or defense, grounded on the Constitution or a law of the United States, is necessarily a question of Federal law; and where a case coming from a state court presents that question, this Court must determine for itself the sufficiency of the allegations displaying the right or defense, and is not concluded by the view taken of them by the state court.'" First National Bank v. Anderson, 269 U. S. 341, 346; Staub v. City of Baxley, 355 U. S. 313, 318.

Allied Stores v. *Bowers*, 358 U. S. 522, 525 (1958).

State procedure cannot be used as a barrier to thwart a persons enforcement of its constitutional rights. *Baker* v. *Carr*, 369 U. S. 186, 236 (1961); *N. A. A. C. P.* v. *Alabama*, 357 U. S. 449, 457 (1958). "But it is not simply a question of state procedure when a state court of last resort closes the door to any consideration of a claim of denial of a federal right." *Young* v. *Regan*, 337 U. S. 235, 238 (1948) (reversing an Illinois case). To permit such tactics of the state courts to continue affirms a denial to those such as petitioner of constitutional rights under the due process and equal protection clause of the Fourteenth Amendment of the United States Constitution.

Respectfully submitted,

EDWARD J. WENDROW,
FRANK O. WETMORE,
Attorneys for Petitioner.

WINSTON & STRAWN,
One First National Plaza,
Chicago, Illinois 60670,
Of Counsel.

APPENDIX

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
County Department, Chancery Division

GLENN R. HEYMAN, TRUSTEE IN BANKRUPTCY OF F. W. KOENECKE & SONS, INC., et al., *Plaintiffs,* *vs.* GEORGE E. MAHIN, Successor Director of the Department of Revenue of the State of Illinois, et al., *Defendants.*	No. 68 CH 3536

AMENDED COMPLAINT

COUNT I

Leave of Court first had and obtained, the plaintiff F. W. Koenecke & Sons, Inc., an Illinois corporation, by Rudnick & Wolfe, Jacob Shamberg and Philip J. Simon, its attorneys, files herewith its Amended Complaint, complaining of the defendants, Theodore A. Jones, as Director of Revenue of the Department of Revenue of the State of Illinois, Adlai E. Stevenson III, as State Treasurer of the State of Illinois, and William G. Clark, as Attorney General of the State of Illinois, and alleges as follows:

1. This proceeding is for a declaratory judgment in a case of an actual controversy authorized under Section 57.1 of the Civil Practice Act. An actual controversy exists between the plaintiff and the defendants herein as to the validity and constitutionality of certain amendments of Section 2(b) of the Illinois Cigarette Tax Act as more fully hereinafter set forth.

2. Defendants Theodore A. Jones is now and was at all times material hereto the duly appointed qualified and acting Director of Revenue of the Department of Revenue of the State of Illinois, and was at all times material hereto charged with the responsibility for the general administration and enforcement of the various revenue statutes enacted by the General Assembly of the State of Illinois, including the Act of the General Assembly hereafter referred to in this Amended Complaint.

3. Defendant Adlai E. Stevenson III is now and was at all times material hereto the duly elected and acting State Treasurer of the State of Illinois.

4. Defendant William G. Clark is now and was at all times material hereto the duly elected and acting Attorney General of the State of Illinois.

5. Plaintiff, F. W. Koenecke & Sons, Inc., an Illinois corporation, received its corporate charter from the State of Illinois on May 4, 1953 as the legal successor to a family enterprise founded in the year 1881. It is engaged in the business of import purchasing and selling of cigarettes to wholesalers and retailers within and beyond the borders of the State of Illinois, and has been actively so engaged during the time aforesaid and up to the date hereof. Throughout the course of its pre-corporate and corporate existence, a period totaling some 87 years, its policy of scrupulously fair, honest and conscientious dealings with the wholesale and retail cigarette trade has been highly instrumental in establishing plaintiff in its unique position as the largest cigarette distributor in the midwest.

6. In conjunction with and as a mandatory adjunct to its business of import purchasing and selling of cigarettes, plaintiff comes within the purview of the Illinois statute described as "An Act in relation to a tax upon persons engaged in the business of selling cigarettes, and providing for collection of such tax and penalties for violation of the

Act." Said Act was approved on June 2, 1941, is known as the "Cigarette Tax Act" and has been amended from time to time.

7. For many years last past plaintiff has been and presently is a duly licensed and bonded "distributor" of cigarettes in the State of Illinois as said term "distributor" is defined in Section 1 of the Cigarette Tax Act. Section 2(a) of said Act fixes the tax rate "per cigarette sold, or otherwise disposed of in the course of such business in this State." Section 2(b) requires the distributor "to collect the taxes provided under paragraph (a) hereof," and Section 3 thereof provides in part as follows:

> "Section 3. Payment of the taxes imposed by Section 2 of this Act shall (except as hereinafter provided) be evidenced by revenue tax stamps affixed to each original package of cigarettes. It shall be the duty of each distributor of cigarettes in this State to a purchaser, to firmly affix a proper stamp or stamps to each such package, or (in the case of manufacturers of cigarettes in original packages which are contained inside a sealed transparent wrapper) to imprint the required language on the original package of cigarettes beneath such outside wrapper, as hereinafter provided.
>
> The Department shall sell such stamps only to persons holding valid licenses as distributors under the provisions of this Act."

8. Under the combined impact of Section 2(a), Section 2(b) and Section 3 of the Act, plaintiff is subjected to and placed under a three-fold burden as follows:

> A. It must prepay to the State of Illinois the cost of cigarette tax stamps it purchases from the State to be affixed to the cigarettes it sells.
>
> B. It must firmly affix a proper stamp or stamps to each package of cigarettes it sells in Illinois.
>
> C. It must collect from its vendees, together with the selling price of cigarettes, the cigarette tax stamps it has affixed to said cigarettes.

9. For a long time prior to July 15, 1963, the discount allowed plaintiff on its purchases of cigarette tax stamps under Section 2(b) of the Act was 5% of said purchases. The statutory enactment relative thereto, approved April 14, 1961, is as follows:

> "(b) The taxes as provided under paragraph (a) hereof shall be subject to a discount of 5%, which discount shall be allowed at the time of purchase of the stamps when purchase is required by this act, or at the time when the tax is remitted to the Department without the purchase of stamps from the Department when that method of paying the tax is required or authorized by this Act."

10. At the 1963 session of the General Assembly, said Section 2(b) was amended, approved July 15, 1963, to read as follows:

> "(b) The taxes as provided under paragraph (a) hereof shall be subject to a discount during any year commencing July 1st and ending the following June 30th in accordance with the schedule set out hereinbelow, which discount shall be allowed at the time of purchase of the stamps when purchase is required by this Act, or at the time when the tax remitted to the Department without the purchase of stamps from the Department when that method of paying the tax is required or authorized by this Act. A discount equal to five percent (5%) of the amount of the tax up and to including the first $700,000.00 paid hereunder by such distributor to the Department during any such year; four per cent (4%) of the next $700,000.00 of tax or any part thereof, paid hereunder by such distributor to the Department during any such year; three per cent (3%) of the next $700,000.00 of tax, or any part thereof, paid hereunder by such distributor to the Department during any such year; and two per cent (2%) of the amount of any additional tax paid hereunder by such distributor to the Department during any such year."

11. At the 1965 session of the General Assembly, said

Section 2(b) was again amended, approved July 15, 1965, to read as follows:

"(b) The distributor shall be required to collect the taxes provided under paragraph (a) hereof, and, to cover the costs of such collection, shall be allowed a discount during any year commencing July 1st and ending the following June 30th in accordance with the schedule set out hereinbelow, which discount shall be allowed at the time of purchase of the stamps when purchase is required by this Act, or at the time when the tax is remitted to the Department without the purchase of stamps from the Department when that method of paying the tax is required or authorized by this Act. A discount equal to 2-6/7% of the amount of the tax up to and including the first $700,000.00 paid hereunder by such distributor to the Department during any such year; 2-2/7% of the next $700,000.00 of tax or any part thereof, paid hereunder by such distributor to the Department during any such year; 1-5/7% of the next $700,000.00 of tax, or any part thereof, paid hereunder by such distributor to the Department during any such year; and 1-1/7% of the amount of any additional tax paid hereunder by such distributor to the Department during any such year."

12. At the 1967 session of the General Assembly, said Section 2(b) was subjected to yet another amendment, approved July 15, 1967, reading as follows:

"(b) The distributor shall be required to collect the taxes provided under paragraph (a) hereof, and, to cover the costs of such collection, shall be allowed a discount during any year commencing July 1st and ending the following June 30th in accordance with the schedule set out hereinbelow, which discount shall be allowed at the time of purchase of the stamps when purchase is required by this Act, or at the time when the tax is remitted to the Department without the purchase of stamps from the Department when that method of paying the tax is required or authorized by this Act. A discount equal to 2-2/9% of the amount

of the tax up to and including the first $700,000.00 paid hereunder by such distributor to the Department during any such year; 1-7/9% of the next $700,000.00 of tax or any part thereof, paid hereunder by such distributor to the Department during any such year; 1-1/3% of the next $700,000.00 of tax, or any part thereof, paid hereunder by such distributor to the Department during any such year; and 8/9 of 1% of the amount of any additional tax paid hereunder by such distributor to the Department during any such year,"

13. A summary of the varying statutory discounts allowed plaintiff on its purchases of cigarettes pursuant to said amendatory acts is as follows:

Year 1961

Prior to July 15, 1963, Discount of 5% on all tax stamps purchased.

1963 Amendment

Approved July 15, 1963.

1st $700,000.00 purchased; 5% discount.
2nd $700,000.00 purchased; 4% discount.
3rd $700,000.00 purchased; 3% discount.
All additional purchases; 2% discount.

1965 Amendment

Approved July 15, 1965:

1st $700,000.00 purchased; 2-6/7% discount.
2nd $700,000.00 purchased; 2-2/7% discount.
3rd $700,000.00 purchased; 1-5/7% discount.
All additional purchases; 1-1/7% discount.

1967 Amendment

Approved July 31, 1967.

1st $700,000.00 purchased; 2-2/9% discount.
2nd $700,000.00 purchased; 1-7/9% discount.
3rd $700,000.00 purchased; 1-1/3% discount.
Additional purchases; 8/9 of 1% discount.

1968 Amendment

Approved September 6, 1968.

1st $700,000.00 purchased; 2-2/9% discount.
2nd $700,000.00 purchased; 1-7/9% discount.
3rd $700,000.00 purchased; 1-1/3% discount.
Additional purchases; 8/9 of 1% discount.

14. In firmly affixing the proper stamp or stamps to every package of cigarettes it sells in Illinois, plaintiff is confronted by a mechanical operation of gigantic proportions. Cigarettes purchased by plaintiff from out-of-State manufacturers are shipped into plaintiff's plant in standard cases, each containing 60 cartons with 10 packages of 20 cigarettes in each carton. The total is 600 packages of cigarettes in a case. Every case must be opened, all 60 cartons removed and opened, and a proper tax stamp affixed to each of the 600 packages. Then the cartons must re-sealed and replaced in the case. Tedious, boring and noxious, the operation is extremely costly in machinery, equipment and manpower. While the discount allowed plaintiff on its purchase of cigarette tax stamps under Section 2(b) of the Act is "to cover the costs" of collecting the cigarette tax, included in such costs are the additional costs of stamping and other tangible expenditures necessarily incurred by plaintiff in connection therewith. The minimum discount allowed under each of said amendatory Acts is not sufficient to cover plaintiff's costs for collecting the cigarette tax, and said costs do not decrease with increased collections of said tax.

15. By virtue of its unique position as the largest Cigarette distributor in the midwest, the above and foregoing amendments of 1963, 1965 and 1967 to Section 2(b) of the Act have had a materially adverse and devastating effect on plaintiff's business operations in that, predicated on a declining graduated discount, it is compelled to pay more for the cigarette tax stamps it purchases from the

State of Illinois than its smaller competitors. Plaintiff's purchases of approximately $700,000.00 in tax stamps per week would have the effect of placing it within 30 days of any year in the lowest discount bracket. Presently plaintiff is being allowed the lowest discount, 8/9 of 1% on its purchases of cigarette tax stamps. Said discount amounts to 48 cents per case, a case consisting of 60 cartons with 10 packages of cigarettes in each carton, or a total of 600 packages. Its smaller competitors are allowed varying discounts on their purchases of cigarette tax stamps as follows:

1st $700,000.00—
a discount of $1.20 per case of cigarettes.
2nd $700,000.00—
a discount of $0.96 per case of cigarettes.
3rd $700,000.00—
a discount of $0.72 per case of cigarettes.

16. Plaintiff further avers that the acts of the General Assembly in its successive amendments of 1963, 1965 and 1967 to Section 2(b) of the Act had as their express purpose the intent to enact class legislation to the detriment of plaintiff and to the advantage of its competitors.

17. The Cigarette Tax Act is a revenue measure and not necessarily regulatory in nature. In the long run the amendatory Acts of 1963, 1965 and 1967 to Section 2(b) will have the effect of converting said Act into a restrictive statute with the avowed purpose of placing plaintiff in the untenable position of being unable to compete with smaller cigarette distributors in Illinois by virtue of proportionately smaller discounts on its purchases of cigarette stamps.

18. Throughout the course of its corporate and pre-corporate existence, the plaintiff has invested large sums of capital in machinery, equipment, supplies and improvements essential to the operation and maintenance of its

business. Its said machinery, equipment, supplies and improvements are adopted specifically to the cigarette business, particularly the stamping of cigarettes pursuant to statutory requirements. Plaintiff repays about $40,000,000.00 annually in cigarette tax stamps purchased from the State of Illinois, which said sum is approximately one-third (1/3) of the State's entire revenue realized from the Cigarette Tax Act for a 12-month period. In the event that the defendants are not restrained from enforcing the 1963, 1965 and 1967 amendments to Section 2(b) of the Act, plaintiff will eventually be forced to discontinue its business operations, and thereby will suffer irreparable injury and damages.

19. Plaintiff alleges that the 1963, 1965 and 1967 amendments to Section 2(b) of the Cigarette Tax Act, as aforesaid, and each of them, are invalid and unconstitutional, being in violation or contravention of the Constitution of Illinois, for the following reasons:

(a) Said amendatory Acts arbitrarily subject plaintiff to special burdens and obligations from which its competitors are exempt. This is in violation of Section 22 of Article IV of the Illinois Constitution.

(b) Said amendatory Acts are so capricious, arbitrary and wilful as to deprive plaintiff of its right to due process of law in violation of Section 2 of Article II of the Illinois Constitution.

(c) Said amendatory Acts are in violation of Section 13 of Article II of the Illinois Constitution.

(d) Said amendatory Acts do not act uniformly upon all licensed cigarette distributors in the State of Illinois and therefore are in violation of Sections 1 and 2 of Article IX of the Illinois Constitution.

20. Plaintiff further alleges that the 1963, 1965 and 1967 amendments to Section 2(b) of the Cigarette Tax Act, as aforesaid, and each of them, are invalid and uncon-

stitutional, being in violation or contravention of the United States Constitution, for the reason that they deprive plaintiff of its property without due process of law in violation of the Fourteenth Amendment to the United States Constitution, and deprives the plaintiff of equal protection of the laws guaranteed by the 14th Amendment to the United States Constitution."

Wherefore, plaintiff prays as follows:

1. That this Court enter a finding declaration supported by its order, judgment or decree, that the 1963, 1965 and 1967, and 1968 amendatory Acts of Section 2(b) of the Cigarette Tax Act, and each of them, are invalid and unconstitutional.

2. That the Court further decree that, by reason of the unconstitutionality of said 1963, 1965 and 1967 and 1968 amendatory Acts of Section 2(b) of the Cigarette Tax Act, said Section 2(b) of the Act, as approved April 14, 1961, is left in full force and effect as it existed prior to the adoption of said amendatory Acts.

3. That the Court enter a permanent injunction enjoining and restraining the defendants, Theodore A. Jones, as Director of Revenue of the Department of Revenue of the State of Illinois, Adlai E. Stevenson III, as State Treasurer of the State of Illinois, and William G. Clark, as Attorney General of the State of Illinois, and their respective officers, agents, employees, deputies and successors in office, from enforcing or attempting to enforce the provisions, or any part thereof, of said 1963, 1965 and 1967 and 1968 amendatory Acts of Section 2(b) of the Cigarette Tax Act.

4. That plaintiff be granted such other or further relief in the premises as to the Court may seem meet.

Count II.

Plaintiff, F. W. Koenecke & Sons, Inc., an Illinois corporation, by Rudnick & Wolfe, Jacob Shamberg and Philip J. Sinnon, its attorneys, as Count II of its Amended Complaint filed by leave of Court first had and obtained, complains of the defendants, Theodore A. Jones, as Director of Revenue of the Department of Revenue of the State of Illinois, Adlai E. Stevenson III, as State Treasurer of the State of Illinois, and William G. Clark, as Attorney General of the State of Illinois, and alleges as follows:

1. Plaintiff is proceeding in this Count under and pursuant to the provisions of the Illinois statute known as "An Act in relation to the payment and disposition of moneys received by officers and employees of the State of Illinois by virtue of their office or employment," Illinois Revised Statutes, Chapter 127, paragraphs 170 et seq. approved June 9, 1911, as amended.

2-20. Plaintiff repeats and realleges each and every allegation contained in paragraphs 2 to 20 inclusive of Count I as paragraphs 2 to 20 inclusive of Count II as if fully set forth herein verbatim.

21. Plaintiff is being presently allowed a discount of 8.9 of 1% on its purchases of cigarette tax stamps pursuant to the provisions of the 1967 amendment to Section 2(b) of the Cigarette Tax Act. In the event that the amendatory Acts of 1963, 1965 and 1967 of said Section 2(b) should be held invalid and unconstitutional, the discount allowed plaintiff on said purchases of cigarette tax stamps would revert to a flat 5% of said purchases, pursuant to the provisions of said Section 2(b) prior to July 15, 1963. The differential between plaintiff's present discount of 8.9 of 1% and the discount of 5% as it existed prior to July 15, 1963, is 4.1 9%.

22. Within thirty (30) days prior to the filing of this Complaint, plaintiff has made payment of taxes as evidenced by purchases of cigarette tax stamps from the Department of Revenue and has paid 4-1 9% thereof under protest and will so continue during the pendency of this action to make purchases of cigarette tax stamps and pay 4-1 9% thereof under protest pursuant to the provisions of said Act entitled "An Act in relation to the payment and disposition of moneys received by officers and employees of the State of Illinois by virtue of their office or employment."

23. Under and pursuant to the provisions of said Act, it is the duty of Adlai E. Stevenson III, as State Treasurer of the State of Illinois, to place said funds so paid and received under protest in a special fund known as a protest fund. Said Act provides that said funds shall be transmitted from the protest fund to the appropriate fund in which it would have been placed had there been no protest, unless the party making such protest shall file a complaint in chancery and obtain within 30 days a temporary injunction restraining such transfer. Plaintiff avers that, unless said defendant Adlai E. Stevenson III is restrained from transferring said funds out of the protest fund, said funds will forever be lost to plaintiff.

24. Plaintiff has no adequate remedy at law with respect to payments heretofore and to be hereafter made under protest pending the disposition of this cause, except under and pursuant to the provisions of said Act in relation to the payment and disposition of moneys received by officers and employees of the State.

Wherefore plaintiff prays as follows:

1. That the Court issue its temporary writ of injunction enjoining and restraining Theodore A. Jones, as Director of Revenue of the Department of Revenue of the State

of Illinois, his deputies, attorneys, agents, servants, employees and successors in office, from paying or disbursing into the State Treasury the sums of money paid by the plaintiff under protest, being 4-1 9% of its gross cigarette tax stamps purchased under the Illinois "Cigarette Tax Act," Ill. Rev. Stat., Ch. 120, Paragraphs 453.1 et seq., during the pendency of this action and until the final determination of this cause, in any manner except in accordance with the provisions of "An Act in Relation to the Payment and Disposition of Moneys Received by Officers and Employees of the State of Illinois by virtue of their office or Employment," Ill. Rev. Stat., Ch. 127, Sec. 170, et seq.

2. That the Court further issue its temporary writ of injunction enjoining and restraining Adlai E. Stevenson III, as State Treasurer of the State of Illinois, his deputies, attorneys, agents, servants, employees and successors in office, from transferring any funds paid into the "Protest Fund" by plaintiff, being funds representing taxes paid under the Amendment to Sec. 2 of the Illinois "Cigarette Tax Act" (Ill. Rev. Stat. Ch. 120, Sections 451.1 et seq.) and paid under protest by plaintiff to the Director of the Department of Revenue, and by him transferred to said State Treasurer during the pendency of this suit, and until the further order of this Court; and that the said Adlai E. Stevenson III, as Treasurer of the State of Illinois, be restrained and enjoined from transferring from the Protest Fund any moneys hereinafter paid under protest by the plaintiff during the pendency of this suit.

3. That the Court enter an order directing the defendants herein to refund, return and repay to the plaintiff any and all funds paid by said plaintiff under protest and which were not due the State of Illinois by virtue of the invalidity and unconstitutionality of said amendatory Acts

of 1963, 1965 and 1967 and 1968 to Section 2(b) of the Cigarette Tax Act.

4. That plaintiff have such other and further relief in the premises, including an allowance to plaintiff for its reasonable costs and attorneys' fees incurred in this cause, as equity may require and to the Court may seem meet.

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
County Department, Chancery Division

GLENN R. HEYMAN, TRUSTEE IN BANKRUPTCY OF F. W. KOENECKE & SONS, INC., et al.,
Plaintiffs,
vs.
GEORGE E. MAHIN, Successor Director of the Department of Revenue of the State of Illinois, et al.,
Defendants.

No. 68 CH 3536

MOTION OF DEFENDANT TO DISMISS THE AMENDED COMPLAINT

Now come the defendants, Theodore A. Jones, Director of Revenue of the Department of Revenue of the State of Illinois, Adlai E. Stevenson, III, State Treasurer of the State of Illinois, and William G. Clark, Attorney General of the State of Illinois, and move the Court to dissolve the temporary injunction heretofore issued, to strike the amended complaint and to dismiss the above entitled cause, and as grounds for said motion the defendants show unto the Court that the amended complaint is without equity and is substantially insufficient in law and does not state a cause of action for the following reasons:

(1) That the Amended Complaint is insufficient in that it fails to allege or aver any facts or circumstances sufficient to warrant any relief under Section 57.1 of the Civil Practice Act, relating to Declaratory Judgments;

(2) That the construction of Section 2 of The Cigarette Tax Act, as amended, Ch. 120, Sec. 453.2, Ill. Rev. Stat. 1967, and Section 3 of the Cigarette Use Tax Act, Ch. 120, Sec. 453.33, Ill. Rev. Stat. 1967, which result in the imposi-

tion of the tax on plaintiff's transactions described in the complaint filed herein is a proper construction and interpretation of said Acts, as amended.

(3) The classification by which the cigarette tax discount is measured in accordance with the schedule as set forth in said Acts, as amended, is both reasonable and proper and cannot be deemed to violate the Federal or State constitutions.

(4) The plaintiff misconceives the nature of the Cigarette Tax Act and the Cigarette Use Tax Act as being property taxes.

(5) Notwithstanding the plaintiff's assertion to the contrary, the 1963, 1965 and 1967 Amendments to Section 2B of the Cigarette Tax Act assailed in this Amended Complaint are in all respects valid and constitutional as are the actions of the defendants which this suit seeks to enjoin. More particularly, neither Section 2b of the Cigarette Tax Act, as amended in 1963, 1965 and 1967, nor any actions of these defendants in enforcing the Cigarette Tax Act, as amended, violate the Federal or State Constitutions in any respect whatsoever, as alleged in said Amended Complaint.

Wherefore, these defendants move that the said Amended Complaint filed in this cause be stricken; that the temporary injunction heretofore issued by dissolved; that this cause be dismissed for want of equity and that these defendants may be henceforth discharged with their reasonable costs and charges most wrongfully sustained.

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
County Department, Chancery Division

GLENN R. HEYMAN, TRUSTEE IN BANKRUPTCY OF F. W. KOENECKE & SONS, INC., et al.,
Plaintiffs,
vs.
GEORGE E. MAHIN, Successor Director of the Department of Revenue of the State of Illinois, et al.,
Defendants.

No. 68 CH 3536

OPINION

This matter appears before the Court upon Plaintiff's amended complaint for declaratory judgment and injunctive relief and defendants' motion to dissolve the injunction heretofore granted and to strike and dismiss the amended complaint.

Plaintiff in Count I seeks a declaration by the Court that the 1963, 1965, 1967 and 1968 amendments to Section 2(b) of the Cigarette Tax Act and each of them are invalid and unconstitutional.

Under Count 2 plaintiff sought and was granted a temporary injunction restraining the Director of Revenue of the State of Illinois, his deputies, attorneys, agents, servants, employees and successors in office from paying or disbursing into the State Treasury the sum of money paid by the plaintiff under protest, and restraining the State Treasurer, his deputies, attorneys, agents, servants, employees and successors in office from transferring any of the monies paid under protest during the pendency of this suit.

Plaintiff alleges that for many years it has been a licensed distributor of cigarettes in the State of Illinois

as the term is defined under Section 1 of the Cigarette Tax Act, and as such is required to collect the tax provided for under the Act. Under the Act all distributors were and are required to purchase cigarette tax stamps from the State, affix the stamp to each package of cigarettes sold in Illinois, and to collect from its vendee the amount represented by the stamps along with the selling price of the cigarettes.

Under the Act as it existed prior to July 15, 1963, a distributor was allowed a discount of 5% at the time of the purchase of the stamps to reimburse the distributor for the cost of affixing the stamps. Commencing in 1963 the flat 5% discount was discarded and a new system of discounts was adopted, predicated on a declining graduated discount related to the number of stamps purchased in any year commencing July 1 and ending June 30 the following year. Subsequent amendments were adopted in 1965, 1967 and 1968, the effect of which were to reduce the statutory discount, a summary of which is as follows:

Year 1961

Prior to July 15, 1963. Discount of 5% on all tax stamps purchased.

1963 Amendment

Approved July 15, 1963.

1st $700,000.00 purchased; 5% discount.
2nd $700,000.00 purchased; 4% discount.
3rd $700,000.00 purchased; 3% discount.
All additional purchases; 2% discount.

1965 Amendment

Approved July 15, 1965.

1st $700,000.00 purchased; 2-6/7% discount.
2nd $700,000.00 purchased; 2-2/7% discount.
3rd 790,000.00 purchased; 1-5/7% discount.
All additional purchases; 1-1/7% discount.

1967 Amendment

Approved July 31, 1967.

1st $700,000.00 purchased; 2-2/9% discount.
2nd $700,000.00 purchased; 1-7/9% discount.
3rd $700,000.00 purchased; 1-1/3% discount.
Additional purchases; 8/9 of 1% discount.

1968 Amendment

Approved Sept. 6, 1968.

1st $700,000.00 purchased; 2-2/9% discount.
2nd $700,000.00 purchased; 1-7/9% discount.
3rd $700,000.00 purchased; 1-1/3% discount.
Additional purchase; 8/9 of 1% discount.

Plaintiff charges in its complaint that the said paragraph (b) of Section 2 of the Act relating to the discount granted to distributors and which graduates the rates on a declining basis based on gross sale of tax stamps to distributors was and is intended to specifically injure the plaintiff by placing it at a competitive disadvantage with respect to all other distributors in the State of Illinois, and in its amended complaint, that the amendments to Section 2(b) had as its express purpose the intent to enact class legislation to the detriment of the plaintiff and to the advantage of its competitors.

The Court does not believe that the General Assembly would deliberately enact legislation specifically intended to injure plaintiff or provide an advantage to competitors of the plaintiff.

The Legislature has broad discretion in establishing the classes and sub-classes which are to be taxed (Fiorito v. Jones, 39 Ill. 2d 531) and the basis on which classes are determined need only be reasonable. Mutual Tobacco Co. v. Halperin, 414 Ill. 226. If the tax is otherwise reasonable in relation to the privilege granted, the fact that it bears

more heavily on one than another is irrelevant. Grenier & Co. v. Stevenson, et al., 42 Ill. 2d 289.

In Mansfield v. Carpentier, 6 Ill. 2d 455, the Court said:

> "The formula imposing a particular tax is no measure of its constitutionality so long as it is a reasonable exercise of legislative judgment. Neither is the fact that a tax may put some individual out of business considered a valid argument against the tax if the tax otherwise is reasonable in relation to the cost of the highways or the abstract value of the privilege of using them."

In Mutual Tobacco Co. v. Halperin, 414 Ill. 226:

> "Absolute equality is impractical in taxation and is not required by the Equal Protection Clause of the Constitution. * * * Perfect equality and uniformity of taxation as regards individuals or corporations or the different classes properly subject to taxation is a dream unrealized."

It is the opinion of the Court that the Amendatory Acts do not violate Section 22 of Article 4, Section 2 of Article 2, Section 13 of Article 2, and Sections 1 and 2 of Article 9 of the Constitution of the State of Illinois, nor do they violate the Fourteenth Amendment to the Constitution of the United States.

An appropriate decree may be presented dissolving the temporary injunction heretofore granted in this cause, and dismissing the amended complaint for want of equity.

On July 2, 1969, a Decree was entered:

This cause coming on to be heard on the motion of George E. Mahin, Successor Director of Revenue of the Department of Revenue of the State of Illinois, by William J. Scott, Attorney General of the State of Illinois, to dismiss plaintiffs' complaint, as amended, and after having heard arguments of counsel and being advised in the prem-

ises and having jurisdiction over the parties and the subject matter:

It Is Ordered that the motion to Strike and Dismiss plaintiffs' complaint, as amended, be and the same is hereby sustained and plaintiffs' complaint, as amended, is hereby dismissed, for want of equity.

It Is Further Ordered that all orders granting temporary injunctions in this cause be and the same are vacated and set aside and all injunctions dissolved accordingly.

It Is Further Ordered that Adlai E. Stevenson III, Treasurer of the State of Illinois, be and is directed to transfer all sums now held in the protest fund into the General Revenue Fund of the State of Illinois upon the expiration of thirty (30) days from the date hereof and provided an appeal has not then been perfected.

It Is Further Ordered that pending an appeal of the cause by the plaintiffs that the Treasurer of the State of Illinois shall keep the amounts heretofore and hereafter paid in such protest fund until the final order of this Court as to the disposition thereof.

It Is Further Ordered that the written opinion heretofore issued by the Court is hereby incorporated herein and expressly made a part of this Decree.

It Is Further Ordered that the above entitled cause be and the same is hereby dismissed.

ENTER:

/s/ THOMAS C. DONOVAN
Judge

Date July 2, 1969

OPINION SUPREME COURT OF ILLINOIS
United States of America

STATE OF ILLINOIS
SUPREME COURT } ss.

At a Term of the Supreme Court, begun and held in Springfield, on Monday, the ninth day of November in the year of our Lord, one thousand nine hundred and seventy, within and for the State of Illinois.

Present: ROBERT C. UNDERWOOD, *Chief Justice*
JUSTICE WALTER V. SCHAEFER
JUSTICE DANIEL P. WARD
JUSTICE CASWELL J. CREES
JUSTICE THOMAS E. KLUCZYNSKI
JUSTICE JOHN T. CULBERTSON, JR.
JUSTICE MARVIN F. BURT
WILLIAM J. SCOTT, *Attorney General*
ROBERT G. MILEY, *Marshal*
Attest: JUSTIN TAFT, *Clerk*

Be It Remembered, that afterwards, to-wit, on the 4th day of December, 1970 the opinion of the Court was filed in said cause and entered of record in the words and figures following, to-wit:

GLENN R. HEYMAN, Trustee, etc., *Appellant* vs. GEORGE E. MANIX, Successor Director of the Department of Revenue of the State of Illinois, et al., *Appellees*	Appeal from Circuit Court Cook County

Docket No. 42544—Agenda 43—May, 1970.

GLENN R. HEYMAN, Trustee, Appellant, *vs.* GEORGE E. MANIX, Director of Revenue, *et al.*, Appellees.

Mr. JUSTICE CRAIG delivered the opinion of the court:

The question presented by this appeal is whether the graduated discounts allowed distributors under the Cigarette Tax Act (Ill. Rev. Stat. 1969, ch. 120, par. 453.2) violate the uniformity provisions of section 1 of article IX of the Illinois constitution and the equal-protection clause of the Federal constitution.

F. W. Koenecke & Sons, Inc., filed its amended complaint in the circuit court of Cook County seeking a declaration that the 1963, 1965, 1967 and 1968 amendments to section 2(f) of the Cigarette Tax Act are unconstitutional and sought to recover sums of money paid to the State under protest. A motion to dismiss was filed by defendants, the Director of the Department of Revenue, the State Treasurer, and the Attorney General. Thereafter, Glenn R. Heyman, as trustee in bankruptcy of the plaintiff, was permitted to join the action and the amended complaint was adopted by him as his pleading. The circuit court found each of the amendatory acts to be constitutional and dismissed the amended complaint. Appeal from that judgment is directed to this court pursuant to Rule 302(a)(2).

The Cigarette Tax Act as originally enacted in 1941 levied a tax on persons engaged in business as distributors of cigarettes in this State measured by the number of cigarettes sold or otherwise disposed of in the course of such business in this State and allowed each distributor a 5% discount on the amount of tax remitted to the State. (Ill. Rev. Stat. 1941, ch. 120, par. 453.2) The Act was later amended to declare that the impact or incidence of the tax was on the retailer, but the distributor remained responsible for payment of the tax and entitled to the discount on the amount of tax remitted to the State. (Ill. Rev. Stat. 1965, ch. 120, par. 453.2.) This amendment changing the incidence of the tax was apparently passed to give the consumer a deduction on his Federal income tax return. 52 I. B. J. 124, 130.

In 1963 the flat 5% discount rate granted to cigarette distributors was discontinued and replaced with a graduated declining discount rate measured by the dollar amount of tax stamps purchased in any year commencing July 1 and ending June 30 of the following year. (Ill. Rev. Stat. 1963, ch. 120, par. 453.2.) The discount rate as adopted in 1963 and its revisions in 1965 and 1967 is as follows:

1963 Amendment

First $700,000 of tax paid	—5% discount
Second $700,000 of tax paid	—4% discount
Third $700,000 of tax paid	—3% discount
All additional tax paid	—2% discount

1965 Amendment

First $700,000 of tax paid	—2 6/7% discount
Second $700,000 of tax paid	—2 2/7% discount
Third $700,000 of tax paid	1 5/7% discount
All additional tax paid	—1 1/7% discount

1967 Amendment

First $700,000 of tax paid —2 2/9% discount
Second $700,000 of tax paid—1 7/9% discount
Third $700,000 of tax paid —1 1/3% discount
All additional tax paid — 8/9% of 1% discount

The 1968 amendment continued the discount rate of the 1967 amendment.

F. W. Koenecke & Sons, Inc., was chartered in 1953 as the legal successor to a family business started in 1881 and is the largest cigarette distributor in the Midwest. Its business is the import-purchasing of cigarettes from the manufacturer and the selling of the cigarettes to wholesalers and retailers both inside and outside of the State. Being a distributor within the definition of the Cigarette Tax Act, it must purchase cigarette tax stamps from the State and affix the stamps to each package of cigarettes it sells in the State.

Cigarettes purchased by plaintiff are shipped to its plant in standard cases. Each case contains 60 cartons with 10 packages of 20 cigarettes in each carton or a total of 600 packages of cigarettes in each case. Each case must be opened, all 60 cartons are removed and opened, a tax stamp is affixed to each of the 600 packages, and the cartons are then resealed and replaced in the case. Plaintiff has special machinery, equipment and personnel to perform this operation.

Plaintiff purchases approximately $700,000 of tax stamps a week and about $40,000,000 of the stamps in the course of a year. This volume of tax stamp purchases puts plaintiff in the lowest discount bracket within the first month of a year's operation. The complaint also alleges that the minimum discount is not sufficient to cover its costs for collecting the cigarette tax and that the cost of

collecting the tax does not decrease with the increased amount of tax collected.

Assuming the allegations of plaintiff's complaint to be true, the inverse volume discount is discriminatory and places a heavier burden on the larger distributors. Of course, the Illinois and Federal constitutions only protect a taxpayer from invidious discrimination (*Dodin v. Korshak*, 39 Ill. 2d 534; *Metropolis Theatre Co. v. City of Chicago*, 228 U. S. 61, 57 L. Ed. 730, 33 S. Ct. 441) and the fact that a tax bears more heavily on one taxpayer than another does not of itself violate the uniformity provision of the Illinois constitution or the equal-protection clause of the Federal constitution. *Grenier & Co. v. Stevenson*, 42 Ill. 2d 289; *Fox v. Standard Oil Co. of New Jersey*, 294 U. S. 87, 79 L. Ed. 780, 55 S. Ct. 333.

We note initially that the cigarette tax is imposed at a flat rate measured by the number of cigarettes sold. It is clear that if the tax were imposed at a graduated rate measured by the number of cigarettes sold, it would be unconstitutional. In *Stewart Dry Goods Co. v. Lewis*, 294 U. S. 550, 79 L. Ed. 1054, 55 S. Ct. 525, the Supreme Court held that a graduated tax on retailers measured by the gross receipts from sales violated the equal-protection clause of the fourteenth amendment. The court found there was no reasonable relation of gross sales to net profit and consequent ability to pay; and, therefore, there exists no reasonable relation of a tax measured by gross sales to the value of the privilege of merchandising. It concluded by stating: "The law arbitrarily classifies these vendors for the imposition of a varying rate of taxation, solely by reference to the volume of their transactions, disregarding the absence of any reasonable relation between the chosen criterion of classification and the privilege the enjoyment of which is said to be the subject taxed. It exacts from two persons different amounts for the privilege of doing exactly similar acts because the one has performed the act

offener than the other." 294 U. S. 550, 566, 79 L. Ed. 1054, 55 S. Ct. 525, 530.

The expressed purpose of the graduated discount allowed to distributors under the Cigarette Tax Act is to cover the distributors' cost of collecting the tax imposed by the Act. Plaintiff asserts, however, that there is no reasonable relationship between the graduated discount and the cost of collecting the tax. It first points out that the amended complaint alleges, and that it is prepared to prove, that the minimum discount allowed under the Act is not sufficient to cover its cost of collecting the tax and that the cost of collecting the tax does not decrease with increased collections of the tax.

It also refers to the fact that in 1963, when the graduated discount was introduced, the cigarette tax was 6¢ per package; that the discount brackets have not been changed since that time; that the discount rates have been reduced; and that the tax has been raised to 12¢ per package. It states that even without the reduction in the discount rates, the increase of the tax rate without changing the discount brackets has reduced the discount during a period of increased costs of collecting the tax and demonstrates that there is no reasonable relation between the statutory discount and the cost of collecting the tax.

Plaintiff has also attached to its brief, as an exhibit, a summary of statutes from other States which impose a cigarette tax. The exhibit shows that, except for Hawaii, all States and the District of Columbia impose a tax on cigarettes and require the affixing of a tax stamp or meter mark on each package of cigarettes. Each State allows the person required to affix the stamp or meter mark a discount. Twenty-four States expressly provide that the purpose of the discount is to compensate for the cost of affixing the stamp or meter mark. There is a great variation in the

discount rates allowed by the various States ranging from 2% in Louisiana to 25% in California. Another exhibit shows the dollar amount of discount allowed per 1,000 packages of cigarettes varies from $7.50 in Alabama to $10 in Michigan. Plaintiff states these exhibits demonstrate that although the purpose of the discount in all States is to compensate for the cost of affixing the tax stamps or meter marks and although the cost of doing so would be approximately the same in all States, there is a great divergence among the States as to rate of discount and the amount of discount. The conclusion plaintiff draws from these exhibits is that the legislative judgments in this field have been arbitrary.

We note parenthetically that the exhibits indicate there are five other States—Florida, Minnesota, New Mexico, New York, and North Dakota—that use a graduated discount. Apparently the constitutionality of the graduated discount has never been challenged in those States.

It is apparent that the graduated discount which is geared to the volume of cigarettes sold in a year has the same ultimate effect as the graduated tax measured by sales which was condemned in *Stewart Dry Goods*. Furthermore, the exhibits and allegations of plaintiff's complaint tend to support its contention that there is no reasonable relation between the graduated discount and the cost of collecting the tax, and defendants have not argued that there is such a relationship. The statute itself, however, states that the discount is to cover the cost of collecting the tax and by graduating the discount it implies that the cost of collection decreases with the number of stamps bought and affixed.

The legislature, of course, has broad powers to enact taxing laws which affect some persons differently than others as long as there is a reasonable state of facts to

justify the discrimination (*Boodin v. Koerbel*, 39 Ill. 2d 521); and a determination by the legislature is presumed supported by facts known to it, under facts judicially known (*Ohio Oil Co. v. Wright*, 286 Ill. 236) or proved (*Duncan v. Holman*, 8 Ill. 2d 87) to show otherwise. We are of the opinion that the facts alleged in the complaint conflict with the legislative determination to such an extent that the graduated discount would be invalid, and plaintiff is entitled to an opportunity to prove these allegations.

The judgment of the circuit court of Cook County is reversed and the cause is remanded for further proceedings.

Reversed and remanded.

IN THE SUPREME COURT OF ILLINOIS

GLENN R. HEYMAN, Trustee in Bankruptcy of F. W. Koeltzecke & Sons, Inc.,
Plaintiff-Appellant,
vs.
GEORGE S. MAHIN, Successor Director of the Department of Revenue of the State of Illinois; et al.,
Defendants-Appellees.

Appeal from the Circuit Court of Cook County.

Honorable THOMAS DONOVAN, Judge Presiding.

PETITION FOR REHEARING.

Now comes George E. Mahin, Successor Director of the Department of Revenue of the State of Illinois, John Lewis, as Treasurer of the State of Illinois and William J. Scott, Attorney General of the State of Illinois, defendants-appellees, and petition that the Court grant a rehearing in the above entitled matter and in support thereof state the following:

1). The lower court, if it is to fix compensation against the State of Illinois, has no jurisdiction under the Illinois Constitution to hear the case. The State of Illinois, under Article IV, Section 26 of the Illinois Constitution, has no jurisdiction over nor can it consent to such jurisdiction, in any case brought against it except in the Court of Claims.

While it is true that an individual agent of the State may be enjoined from exercising an unconstitutional act, the Court can not award any judgment against the State except in the Court of Claims and the limit recoverable against the State in the Court of Claims is the sum of $25,000. Therefore, if plaintiff be successful in the court

below, he would only recover a void judgment. We believe the Court should clearly limit its action in view of the jurisdictional prohibition.

2] The Court, in its opinion handed down on December 4, 1970, held, that there was no apparent reasonable relationship between the method of compensation set forth in the statute allowing discounts to compensate the dealer for expense involved in collecting the tax by the increase in volume of sales and cost involved in collecting the taxing and stamping of the cigarette packages.

3] If a rehearing is not granted, many dealers will contest the fairness of the discount allowed or compensation provided under the statute and demand a jury trial in the hope that a jury or court may reward them with substantial compensation.

4] The recent decision of this Court on Docket No. 43021—Agenda 71; September 1970, (*Sherman-Reynolds, Inc.* Appellant, v. *George E. Makin*, Director of Revenue), the Court, referring to the extent put to an employer by reason of the withholding tax on compensation paid to employees, said:

> "Plaintiff's claim that employers have a constitutional right to compensation for their services and expenses incurred in withholding tax is bottomed on the guarantees of the State and Federal constitutions that no person shall be deprived of property without due process of law. (Ill. Const., art. II, § 2; U. S. Const. amend. XIV.) and upon the similar provisions in each constitution which direct that private property shall not be taken for public use without just compensation. (Ill. Const., art. II § 13; U. S. Const., amend. V.) And the broad sweep of its initial argument here is that these constitutional provisions are self-executing, making it incumbent upon the judiciary to ascertain and award just and reasonable compensation. Although the uncompensated withholding tax by employers has been the practice in the Federal

government for many years, the issue here presented, so far as we have been informed and can ascertain, appears to be one of first impression. *Kellems v. United States* (D. C. Conn. 1951), 97 F. Supp. 681, relied upon to some degree by defendants, is not helpful. Its only holding was that an employer's "belief" that the Federal Withholding Act (26 U. S. C. A. § 1621 *et seq.*) was unconstitutional, did not relieve such employer from penalties assessed for failure to comply with the Act. The presumptive constitutional validity of the Act permitting withholding was not attacked in the manner that our own act is challenged in this case.

"As a consequence, plaintiff seeks to persuade us on the basis of principles and analogies diligently drawn from factually inapposite decisions applying the constitutional provisions upon which it seeks to rely. We see no useful purpose to be served by analyzing each decision cited, or in setting forth the various approaches of plaintiff in detail. For even if it be agreed that a "right" to compensation flows to plaintiff from the guarantees of due process of law, or from the constitutional commands relating to the taking of private property for public use, or both, such right is subordinate to the police power of the State employed here in support of the authority to tax and, in our view, any "loss" or "taking" of property occasioned by an employer's compliance with the withholding provisions of article 7 is *damnum absque injuria*."

Furthermore, the taking of property or the imposing of expense by the State in the exercise of valid police power does not put an obligation upon the State to reimburse the party put to the expense. The many cases of corporations who have to file numerous reports with governmental bodies clearly illustrate that there is no obligation for reimbursement.

5] The obvious result of such a situation will not only be to engulf the courts with numerous trials, but will con-

stitute the court and jury as a legislature to fix the compensation in each case. If this occurs, there obviously would be no uniformity of compensation, no equal protection of the laws to each dealer, no equal protection of the law, or uniform method of allowing costs to the taxpayer.

The judiciary has no right to exercise legislative discretion and set what it deems to be reasonable compensation for expenses entailed. A recent Arizona Supreme Court decision (*Apache* v. *Atchison, Topeka, Santa Fe Railroad*, No. 9946 (1970)) stated:

> "It is the State's position that the placing of railroad properties in a classification requiring their assessment at 60% of full cash value is a constitutional exercise of legislative discretion and that the reduction from 60% to 40% ordered by the Supreme Court was a *judicial reclassification* wholly *unauthorized by law*. It is the railroads' position that the statute under which the 60% assessment was levied was unconstitutional and that all taxes paid under protest, not simply the difference between 40% and 60% of the full cash value of their properties, may be recovered." (Emphasis supplied.)

6] Furthermore, would not the judgment of the circuit courts and the taking of jurisdiction by the circuit courts violate Section 26 of Article IV of the Illinois Constitution which prohibits the State from being sued in any forum except in the Court of Claims of Illinois.

7] If instead o the State being sued, the Director of the Department of Revenue George E. Mahin be classified as an individual defendant, would the Article of the Illinois Constitution be thwarted and bypassed by a subterfuge?

8] We are informed that there are now seven additional cases pending in the circuit courts using the language of the complaint in the case at bar seeking to contest the compensation provided under the statute. This would

produce the results that each discount as to each vendor would have to be litigated separately.

not a similar jam result and the State collection of taxes be seriously affected?

9] Furthermore, if an accepted principle generally recognized in business that the greater the volume, the lesser the overhead and the lesser the cost, motivated the Legislature in passing the statute fixing the compensation of the dealer, can it be urged that the adoption of an accepted standard violates the Due Process Clauses of the Constitution of the State of Illinois, Sec. 2, Article II and United States Constitution Fourteenth amendment?

The Court in its opinion stated that "the express purpose of the graduated discount allowed to distributors under the Cigarette Tax Act is to cover the distributors cost of collecting tax imposed by this Act."

The Court overlooks the fact that legislature did not indicate that the allowance for cost was to cover all costs of each and every distributor. The court overlooks the fact that the legislature need not have given any discount whatsoever to cover any cost for collection of the tax. Therefore, whatever discount or discounts the legislature did grant was merely a bounty on the part of the legislature which need not be uniform, is not a tax and need not be given at all. 16 Am. Jur. 2nd Constitutional Law, Sec. ....., *Chicago Burlington & Quincy Railroad Co.* v. *Ill. ex rel. Greenwood*, 206 U. S. 561, 56 L. Ed. 596, 26 S. Ct. 341. If the plaintiff does not wish to accept the gift, they do not need to. The plaintiff has admitted that the full tax imposed upon the retailer has been collected by the plaintiff. Said tax as pointed out by the Court was a flat rate and not a graduated tax.

10] The general principle usually applied in such an instance is not whether in each case the method of com-

pensation is fair or reasonable, but whether in general the method follows an accepted practice or standard in business.

11] The plaintiff and the Court have alluded to various acts of other states as an indication that there is no reasonable relationship between the graduated discount and the cost of collecting the tax. The acts or intent of the legislature of other states should have no bearing upon the intention of the legislature of the State of Illinois.

12] We further observe that there is no law compelling anyone to go into the cigarette vending business and even if in an individual case the cost of collecting the tax and the stamping of the cigarette packages exceeds the compensation or discount, such result should not entitle a dealer to sue the State of Illinois in any court, possibly other than in the Court of Claims.

We earnestly urge that a rehearing be granted so that the chaotic consequences, both to the State of Illinois and to the dealers involving delegation of legislative powers to the judiciary causing unequal protection of the laws and a "hit or miss" system clearly not contemplated by the Constitution of the State of Illinois nor by the Illinois Legislature.

Respectfully submitted,

WILLIAM J. SCOTT,
Attorney General of the State of Illinois,
160 North La Salle Street, Suite 900,
Chicago, Illinois 60601 (793-3500),
Attorney for Defendants-Appellees.

FRANCIS T. CROWE,
CALVIN C. CAMPBELL,
SAMUEL E. HIRSCH,
Assistant Attorneys General,
Of Counsel.

OPINION SUPREME COURT OF ILLINOIS
United States of America

STATE OF ILLINOIS }
SUPREME COURT } ss.

At a Term of the Supreme Court, begun and held in Springfield, on Monday, the thirteenth day of September in the year of our Lord, one thousand nine hundred and seventy-one, within and for the State of Illinois.

Present: ROBERT C. UNDERWOOD, *Chief Justice*
Justice WALTER V. SCHAEFER
Justice DANIEL P. WARD
Justice JOSEPH H. GOLDENHERSH
Justice THOMAS E. KLUCZYNSKI
Justice CHARLES H. DAVIS
Justice HOWARD C. RYAN
WILLIAM J. SCOTT, *Attorney General*
ROBERT G. MILEY, *Marshal*
Attest: JUSTIN TAFT, *Clerk*

BE IT REMEMBERED, that afterwards, to-wit, on the 30th day of September, 1971 the opinion of the Court was filed in said cause and entered of record in the words and figures following, to-wit:

GLENN R. HEYMAN, Trustee, etc., *Appellant*,
vs.
GEORGE E. MAHIN, Successor Director of the Department of Revenue of the State of Illinois, et al., *Appellees*.

No. 42544

Appeal from Circuit Court Cook County

Docket No. 42544—Agenda 59—March, 1971.

GLENN R. HEYMAN, Trustee, Appellant, *vs.* GEORGE E. MAHIN, Director of Revenue, et al., Appellees.

MR. JUSTICE RYAN delivered the opinion of the court:

This is an appeal from the circuit court of Cook County which upheld the constitutionality of the graduated discounts allowed to distributors under the Cigarette Tax Act. Ill. Rev. Stat. 1969, ch. 120, par. 453.2.

F. W. Koenecke and Son, Inc. filed an amended complaint which seeks a declaration that the 1963, 1965, 1967 and 1968 amendments to section 2(b) of the Cigarette Tax Act are unconstitutional as violating the uniformity provision of section 1 of article IX of the Illinois constitution and the equal protection clause of the fourteenth amendment of the Federal constitution. The plaintiffs seeks to recover sums of money paid to the State under protest. The defendants, the Director of the Department of Revenue, the State Treasurer and the Attorney General filed a motion to dismiss. Glenn R. Heyman, as trustee in bankruptcy of plaintiff, was permitted to intervene in the cause on behalf of the plaintiff and to adopt the amended complaint as his pleading. The circuit court found each of the amendatory acts to be constitutional and dismissed the amended complaint. This appeal is from that judgment, pursuant to Rule 302(a) (2), then in effect.

The Cigarette Tax Act as originally enacted in 1941 levied a tax on persons engaged in business as distributors of cigarettes in the State measured by the number of cigarettes sold or otherwise disposed of in this State in the course of such business and allowed each distributor a 5% discount on the amount of tax paid to the State. (Ill. Rev. Stat. 1941, ch. 120, par. 453.2.) In *Johnson* v. *Daley*, 403 Ill. 338, this court held the Cigarette Tax Act to be an occupation tax and in *Mutual Tobacco Co.* v. *Halpin*, 414 Ill. 226, this court stated that the Cigarette Tax Act was a tax imposed on persons engaged in business as distributors of cigarettes in this State.

In 1963 the Act was amended and declared that the impact or incidence of the tax is on the retailer; however, under the amended Act the distributor continues to have the responsibility of affixing the tax stamps to the cigarette packages and is required to add the tax to the price of the cigarettes sold. Under the amendment any distributor who fails to properly collect and pay the tax imposed is liable for the tax. Ill. Rev. Stat. 1965, ch. 120, par. 453.2.

Under the 1963 amendment the flat 5% discount rate granted the cigarette distributors under the 1941 Act as amended was discontinued and replaced with a graduated declining discount rate measured by the dollar amount of the taxes paid by the distributor in any year commencing July 1 and ending June 30 of the following year. (Ill. Rev. Stat. 1963, ch. 120, par. 453.2(b).) The discount rate schedule adopted in 1963 and its revisions in 1965 and 1967 are as follows:

1963 Amendent

First $700,000 of tax paid—5% discount
Second $700,000 of tax paid—4% discount
Third $700,000 of tax paid—3% discount
All additional tax paid—2% discount

1965 Amendment

First $700,000 of tax paid—2 6/7% discount
Second $700,000 of tax paid—2 2/7% discount
Third $700,000 of tax paid—1 5/7% discount
All additional tax paid—1 1/7% discount

1967 Amendment

First $700,000 of tax paid—2 2/9% discount
Second $700,000 of tax paid—1 7/9% discount
Third $700,000 of tax paid—1 1/3% discount
All additional tax paid—8/9% of 1% discount

The 1968 amendment continued the discount rate of the 1967 amendment. Section 2(b) of the Act in regard to the schedule of discounts states: "(b) The distributor shall be required to collect the taxes provided under paragraph (a) hereof, and, to cover the costs of such collection, shall be allowed a discount during any year * * * in accordance with the schedule set out * * *."

It is the graduated feature of the rate of discount which plaintiff claims discriminates against it as hereinafter indicated.

F. W. Koenecke and Sons, Inc. is a licensed distributor of cigarettes in Illinois. Its business is the import purchasing of cigarettes from the manufacturer and the selling of cigarettes to wholesalers and retailers, both inside and outside of this State. It is the largest distributor of cigarettes in the midwest. As a distributor, the statute imposes upon it the obligation of affixing to each package of cigarettes a revenue tax stamp before delivering them in this State to a purchaser.

Cigarettes purchased by plaintiff are shipped to its plant in standard cases. Each case contains 60 cartons with 10 packages of 20 cigarettes in each carton or a total of 600 packages of cigarettes in each case. Each case is opened, all 60 cartons are removed and opened, a tax stamp is affixed to each of the 600 packages, and the cartons are then

resealed and replaced in the case. Plaintiff has special machinery, equipment and personnel to perform this operation. The amended complaint alleges that plaintiff purchases approximately $700,000 of tax stamps a week which has the effect of placing plaintiff in the lowest discount bracket within the first month of the year's operation.

Although, since the amendment to the Act in 1963 the statute has specifically provided that the tax imposed thereunder is a tax imposed upon "any person engaged in the business as a *retailer* of cigarettes" (emphasis added), plaintiff as a premise of its constitutional argument insists that the Act still imposes an occupational tax upon distributors of cigarettes. The *Mutual Tobacco Co.* case which so held and which plaintiff cites in support of its position was decided prior to the 1963 amendment, at a time when the Act specifically provided that the tax imposed thereunder was a tax imposed upon any person engaged in the business as a *distributor* of cigarettes. Although the Act since the 1963 amendment has continued to look to the distributor for the collection of the tax, it has likewise provided since that date: "The impact of the tax levied by this Act is hereby declared to be imposed upon the retailer and shall be prepaid or pre-collected by the distributor for the purpose of convenience and facility only, and the amount of the tax shall be added to the price of the cigarettes sold by such distributor." (Ill. Rev. Stat. 1967, ch. 120, par. 453.2.) We think the language of the Act is clear. The tax is no longer an occupation tax imposed upon distributors of cigarettes but is an occupation tax imposed upon those engaged in business as retailers of cigarettes in this State. Since the statute specifically requires that the distributor pass the tax on to the retailer, no incidence of the tax falls upon the distributor and we are concerned not with the effect of the tax upon the distributor but with the effect of the discount which, as specifically stated in the

Act, is in the nature of compensation to the distributor to cover the costs of collecting the tax from the retailer.

Plaintiff contends that the graduated discount, decreasing as the amount of tax remitted by the distributor to the Department increases, has the same effect as a graduated tax on the distributors which increases with the volume of sales. Plaintiff then asserts that under the holding in *Stewart Dry Goods Co.* v. *Lewis*, 294 U. S. 550, 79 L. Ed. 1054 and *Valentine* v. *Great Atlantic & Pacific Tea Co.*, 299 U. S. 32, 81 L. Ed. 22, such a graduated tax must be held violative of the equal-protection clause of the fourteenth amendment. In these two cases the tax was based on a graduated percentage of the gross receipts or gross sales.

We do not consider either the *Stewart* case or the *Great Atlantic & Pacific Tea Co.* case to be helpful or in any way controlling in deciding the case now before us. Since the 1963 amendment to the Act as above stated the incidence of the tax is clearly on the retailer and not on the distributor. As Mr. Justice Roberts stated in *Monamotor Oil Co.* v. *Johnson*, 292 U. S. 86, 78 L. Ed. 1141, at page 1148: "The short answer to the contention is that the statutes properly construed lay no tax whatever upon distributors, but make of them mere collectors," and at 1147, "Instead of collecting the tax from the user through its own officers, the state makes the distributor its agent for that purpose. This is a common and entirely lawful arrangement." (78 L. Ed. at 1148.) See also *Pierce Oil Corp.* v. *Hopkins*, 264 U. S. 1376, 68 L. Ed. 593; *International Harvester Co.* v. *Wisconsin Dept. of Taxation*, 322 U. S. 435, 88 L. Ed. 1373; 51 Am. Jur., Taxation, sec. 1277.

The plaintiff therefore was not a taxpayer subsequent to the 1963 amendment to the Act but was instead acting solely as an agent for the State in the collection and the remittance of the tax. Since we have determined that no tax is imposed on the distributors of cigarettes under the

provisions of section 2(b) of the Act, the graduated discount provision thereof cannot therefore violate section 1 of article IX of the Illinois constitution of 1870 (uniformity provision).

If plaintiff affixes revenue stamps with a face value of $100,000 to packages of cigarettes, it receives $100,000 when those packages of cigarettes are sold to a retailer. However, if, as alleged, plaintiff is in the lowest discount bracket, under the 1968 amendment it is entitled to a discount of 8 9 of 1%. The $100,000 worth of revenue stamps therefore do not cost the plaintiff $100,000 buf approximately $888.88 less than that amount. This sum represents compensation to the distributor, as stated in the Act "to cover the cost of such collection." There is no constitutional right to such compensation. Had the legislature seen fit it could have made no provision for compensation to the distributor to cover the cost of collecting the tax. *Sherman-Reynolds, Inc.* v. *Mahin*, 47 Ill. 2d 323.

Alternatively plaintiff argues that even if the State has no constitutional obligation to justly compensate the distributors for performing tax-collecting services, once the State decides to do so it cannot do so in such a way as to discriminate among members of the class performing the same services.

The legislative purpose in providing for compensation to distributors is to cover the cost of collecting the tax. It is apparent from the fact that four separate brackets are established that the legislature has made a determination that the cost of collecting the taxes decreases as the volume of sales of packages of cigarettes increases. The legislature has a wide discretion in classifying objects of its legislation and its exercise of that discretion will not be interfered with unless clearly in violation of some constitutional limitation. There is a presumption in favor of the validity of the classification and one who assails the same

has the burden of showing that the classifications are arbitrary. (*Pacific States Box and Basket Co.* v. *White*, 296 U. S. 176, 80 L. Ed. 138; *People* v. *Saltis*, 328 Ill. 494.) In an attempt to overcome this presumption, plaintiff relies on the allegations of the amended complaint which it contends were admitted to be true by the defendant's motion to strike which the trial court granted. Concerning the question of costs the amended complaint alleges: "While the discount allowed plaintiff on its purchases of cigarette tax stamps under Section 2(b) of the Act is 'to cover the cost' of collecting the cigarette tax, included in such costs are the additional costs of stamping and other tangible expenditures necessarily incurred by plaintiff in connection therewith. The minimum discount allowed under each of said amendatory Acts is not sufficient to cover plaintiff's costs for collecting the cigarette tax, and said costs do not decrease with increased collections of said tax." It is the last sentence of these allegations which plaintiff insists discloses the arbitrary classification made by the legislature relative to costs. However, this sentence refers only to plaintiff's costs and makes no allegations as to the costs throughout the industry of collecting the taxes. As stated in *Hegeman Farms Corp. v. Baldwin*, 293 U. S. 163, 79 L. Ed. 259 at 262: "They do not tell us whether the appellant ran its business with reasonable efficiency when compared with others in its calling."

Assuming that the minimum discount rate is not sufficient to cover the costs for collecting cigarette tax by *all* distributors, this fact would not render the Act invalid. Under *Sherman-Reynolds, Inc.* the legislature is not required to grant any compensation for collecting the taxes. It would follow therefore that partial compensation for the costs of collecting the taxes would not be objectionable.

Again, assuming the allegation to be that costs generally (instead of plaintiff's costs) do not decrease with increased

collection of taxes, we do not consider this allegation to be a sufficient allegation of facts to rebut the presumption of constitutionality of the classification. As was stated in *Pacific States Box and Basket Company*: "The burden is not sustained by making allegations which are merely the general conclusions of law or fact * * *. Facts relied upon to rebut the presumption of constitutionality must be specifically set forth * * *. A motion to dismiss, like a demurrer, admits only facts well pleaded." (80 L. Ed. at 146.) A motion to dismiss does not admit conclusions of facts unsupported by specific allegations of fact upon which such conclusions rest. (*Pierce* v. *Carpentier*, 20 Ill. 2d 526; *Kurtzon* v. *Kurtzon*, 395 Ill. 73.) It may be that costs do not decrease with increased collection of taxes after a distributor reaches a certain volume of business or under certain circumstances, but the flat allegation that costs do not decrease with increased collections of taxes can only be taken as a conclusion of the pleader which is contrary to common experience and knowledge. Mr. Justice Cardozo stated in his dissenting opinion in *Stewart Dry Goods Co.* v. *Lewis*, 294 U. S. 550, 79 L. Ed. 1054, at 1063: "Economically, the theory is that there is a minimum of size for business units below which efficiency is less on the average than expansion would tend to make it; that there are intermediate levels within which efficiency is subject on the average to progressive development; and that there is an ultimate level beyond which efficiency, even if promoted, goes forward more slowly and at a diminishing ratio."

The amended complaint alleges that the operation of affixing revenue stamps is "extremely costly in machinery, equipment and manpower." In line with Justice Cardozo's observation quoted above it would appear that if the costly machinery and equipment is operated at a capacity below its maximum efficiency, any increase in the number of revenue stamps affixed to cigarette packages by the use of this machinery and equipment would result in

a decreased cost per revenue stamp affixed. This is contrary to the general allegation of the plaintiff that "said costs do not decrease with increased collections of said tax." For these reasons we hold that the defendants' motion to dismiss does not admit the allegations of this conclusion stated in the amended complaint.

We find nothing in the admitted allegations of the amended complaint which overcomes the presumption of the validity of the classification for discount purposes which the legislature has made. The admitted allegations do not indicate that the classifications are arbitrary or capricious in violation of the equal-protection clause of the fourteenth amendment of the Federal constitution or the special legislation prohibition of section 22 of article IV of the Illinois constitution of 1870.

The judgment of the circuit court of Cook County is affirmed.

Judgment affirmed.

State of Illinois
Office of
CLERK OF THE SUPREME COURT
Springfield
62706

November 24, 1971

Mr. Frank O. Wetmore
Attorney at law
1 First National Plaza
Chicago, Ill. 60670

No. 42544—Glenn R. Heyman, Trustee, etc., appellant, vs. George E. Mahin, Successor Director of the Department of Revenue of the State of Illinois, et al., appellees. Appeal, Circuit Court (Cook).

You are hereby notified that the Supreme Court today *denied* the petition for rehearing in the above entitled cause.

Very truly yours,

/s/ JUSTIN TAFT
Clerk of the Supreme Court